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In The

Supreme Court of the United States

October Term, 1990

WARREN McCLESKEY,

Petitioner,

vs.

WALTER D. ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC & CLASSIFICATION CENTER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER WARREN McCLESKEY

JULIUS L. CHAMBERS, III
RICHARD H. BURR, III
GEORGE H. KENDALL
99 Hudson Street
New York, New York 10013
(212) 219-1900

ANTHONY G. AMSTERDAM
New York University
School of Law
40 Washington Square South
New York, New York 10012
(212) 998-6198

*Attorney of Record

ROBERT H. STROUP
141 Walton Street
Atlanta, Georgia 30303
(404) 522-8500

*JOHN CHARLES BOGER
School of Law, CB# 3380
Van Hecke-Wettach Hall
Chapel Hill, North Carolina 27599
(919) 962-8516

Attorneys for Petitioner Warren McCleskey

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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This is petitioner's reply to the Brief for the Respondent (hereinafter "the State") and the Brief Amicus Curiae of the Criminal Justice Legal Foundation (hereinafter "the Foundation").[1] Although these two briefs adopt different approaches, their pages share a common thread: the desire to divert this Court's attention from the factual findings of the District Court, and from the settled legal significance of those facts.

The State urges this Court to reconstitute itself as a *nisi prius* tribunal: to ignore the District Court's findings, indeed to ignore even findings by the Court of Appeals that displease the State, and to reweigh the credibility of each witness for itself. The Foundation's approach is different. Rather than dwell upon the facts, it urges the Court to reconstitute itself a legislative tribunal. Dismiss the common law heritage, it argues; "[t]oday's writ . . . is a different procedure with a different purpose." (Fnd. Br. 3). Forget or distort this Court's prior federal decisions; they are distinguishable, or like *Fay*, "a dead letter." The Court's leading precedent, *Sanders v. United States*, is mere "dictum . . . hitched . . . to a broken post," (Fnd. Br. 26); Congressional intent, no more than "murky waters" where the Foundation finds very "little light." (Fnd. Br. 22). This approach is, of course, a siren's song: attractive but fatal. It calls on the Court to abandon its judicial role in habeas cases.

In this reply, we will first undo the State's chief mischief – its attempt to obscure and disparage the factual findings made by the District Court. Two principal areas deserve attention: (i) the District Court's findings in support of a *Massiah* violation; and (ii) the District Court's findings on petitioner's efforts to uncover that

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[1] Each reference to the State's brief will be indicated by the abbreviation "St. Br." followed by the number of the page on which the reference may be found. References to the Foundation's brief will be indicated by the abbreviation "Fnd. Br."

violation. We will then briefly address the State's disingenuous reformulation of the standards for judging abuse and its recasting of this Court's pronouncements on Rule 52(a). Finally, we will consider the Foundation's nihilistic call to discard the legal past and declare a new, free-form law of abuse.

I

THE STATE'S ATTEMPT TO SWEEP ASIDE FACTUAL FINDINGS, MADE BY THE DISTRICT COURT AFTER A FULL EVIDENTIARY HEARING, SHOULD BE REJECTED

The State launches three attacks against the District Court's factual findings on the *Massiah* violation. *First*, it works to portray the District Court as confused and capricious, reaching "two different conclusions" on the merits and (St.Br. 29), "simply chang[ing] its mind . . . unsupported by any evidence." (St.Br. 30-31). *Second*, it reargues the evidence, marshalling a long list of State witnesses who deny any knowledge of a *Massiah* violation. *Finally*, it lashes out at jailor Ulysses Worthy, throwing every brick available, heedless of the record on this appeal. Let us address these attacks in order.

A. The District Court's Purported "Change of Mind"

Petitioner fully agrees with the State on one point: the District Court was initially quite skeptical of petitioner's *Massiah* allegations. The record clearly demonstrates that, at the outset of the federal hearing on July 8, 1987 – prior to the receipt of any evidence – the court expressed (i) open doubts about the existence of a *Massiah* violation and (ii) confidence in the word of informant Offie Evans. (*See, e.g.* R4-4-5). Once the evidence began to come in, however, the District Court began to change its mind. The change was prompted by the facts – by the testimony of relevant witnesses, by documents, by transcripts of prior proceedings – all of which led to the findings the State now laments.

This is, of course, exactly the process of decisionmaking contemplated by the Anglo-American system. The State can have no real quarrel with the process, only with the outcome. The record shows, not a district court that was confused, but a district court that became enlightened. Indeed, there is no better indication of the strength of petitioner's evidence than its power to move the district judge from an initial presumption *against* petitioner's claims to an ultimate grant of habeas relief. (*See* R5 165-166).

B. The Evidence of a *Massiah* Violation

What was the evidence that caused the District Court to change its mind? The State has stressed its long list of witnesses, each of whom has denied knowledge of any *Massiah* violation: among them, District Attorney Russell Parker (St.Br. 9); jailor Carter Hamilton (St.Br. 9 & 11); and Detective Jowers (St.Br. 9). Yet most of these witnesses were outside the circle of conspiracy, and their denials thus mean nothing.[2] One cannot disprove

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[2] Although the State stresses, for example, that jailor Hamilton knew of no move of informant Evans in the Fulton County Jail (St.Br. 11), during cross-examination, Hamilton admitted that his knowledge was confined to what happened on his work shift, on the first floor of the multi-floor, multi-wing jail (R6-76):

> Q. All right. And if a prisoner were placed initially in isolation on the second floor and after a day or two moved down on to the first floor, would you have known necessarily that he had been on the . . . second floor before he appeared within your area of responsibility on the first floor?
>
> A. You know, unless somebody told you, no . . .
>
> Q. All right. And, in fact, with respect to Offie Evans in particular, you don't have any present-day recollection as to the circumstances of his

(Continued on following page)

Caesar's assassination by calling witnesses who weren't at the Capitol.

There were other witnesses, however, whose testimony did present critical credibility choices for the District Court. Chief among them were Atlanta Detectives Sidney Dorsey and Welcome Harris. Both of these officers, during the 1987 federal hearing, denied that they had ever held any private jailhouse meetings with Offie Evans at which an illegal informant relationship could have been discussed. They claimed to have attended only the July 12, 1978, meeting where District Attorney Parker was present. (St.Br. 10 & 12).

Yet petitioner produced contrary evidence – drawn directly from informant Offie Evans himself. During petitioner's 1981 state habeas corpus hearing, Offie Evans told the state habeas court of *two* meetings with Atlanta detectives, the *first* with Detectives Welcome Harris and Sidney Dorsey alone (St. H. Tr. 117; Fed. Exh. 16), the *second*, with Parker and others. (St. H. Tr. 118).[3]

(Continued from previous page)

being brought into the Fulton County Jail; isn't that correct?

A. . . . No. As to when he came in, no, sir. I don't know that.

(R6-74-75). The District Court made exactly this point in its findings: "The lack of corroboration by other witnesses is not surprising; the other witnesses, like Assistant District Attorney Parker, had no reason to know. . . . " (J.A. 81).

[3] Detective Dorsey mentioned during the 1987 federal hearing that he had been contacted by Assistant District Attorney Parker following petitioner's 1981 state habeas corpus hearing. (R6-86-88). During their conversation, Parker and Detective Dorsey discussed the testimony given by Offie Evans at petitioner's hearing, specifically mentioning Evans' testimony which revealed a possible *Giglio* violation. Apparently, Detective Dorsey assured the prosecutor "that the man [Evans] was lying" (R6-87) and that he "didn't remember any type conversation of that type." (R6-87).

In addition to this sharp contradiction, Detective Sidney Dorsey's testimony caught the District Court's ear for a second reason. Dorsey was remarkably evasive, professed a selective memory loss, and appeared carefully rehearsed in his denials. Dorsey was forced to acknowledge, however, that he had known informant Evans prior to the McCleskey case, indeed, that he had personally used Evans as an informant in other cases. He nonetheless claimed to have lost all memory about his dealings with Evans during this investigation:

Q. Okay . . . [Evans] found himself in the Fulton County Jail in July of 1978. Did you go see him at any point in July?

A. Counselor, I do not recall going to see Offie Evans at the Fulton County Jail during that time or any time.

Q. Do you remember any meetings that might have been held between Mr. Evans and yourself and Detective Harris and Russell Parker at the jail?

A. Counselor, in all honesty, I do not.

* * *

A. I'm not suggesting that the meeting didn't take place, nor am I suggesting that I wasn't there. *I just don't recall being there and for some reason no one else remembers my being there either.*

(R5-57-58, 59-60) (emphasis added).

As the excerpt above reveals, Detective Dorsey did not deny categorically that he had met with Evans. On the contrary, he acknowledged that he "probably did" meet with Evans (R5-60), that it was "very possible" he had done so. (R5-66). He simply could not remember.

To summarize: a police-officer was murdered; Detective Dorsey was on the team assigned to the case; no solid evidence emerged to identify the triggerman; Dorsey learned, however, that Warren McCleskey, a chief suspect, and Dorsey's old friend and informant, Offie Evans, were both being housed in the Fulton County Jail; informant

Evans soon thereafter came forward with crucial evidence, collected at the jail from McCleskey; and Dorsey took part in the meeting where District Attorney Parker first heard the crucial evidence. Yet Dorsey – the only officer who had known Evans previously – testified that he remembered nothing about the events that led to this dramatic break in the case.

It was after listening to this evidence that Judge Owen Forrester reached his conclusion: "Unforfunately, one or more of those investigating Officer Schlatt's murder stepped out of line. Determined to avenge his death the investigator(s) violated clearly-established case law." (J.A. 90). "Detective Dorsey," the District Court observed elsewhere, "had an obvious interest in concealing any [*Massiah*] arrangement." (J.A. 82).

Under Rule 52, these findings were reasonable, they were not "clearly erroneous," and they are not subject to reargument here by the State.

C. The Testimony of Ulysses Worthy

The State's most vehement remarks are reserved for jailor Ulysses Worthy, whose testimony, it contends, "is so inconsistent, confusing and incoherent that one cannot discern readily any specific facts." (St.Br. 12). During Worthy's initial federal appearance on July 9, 1987, however, the basic outlines of his story seemed clear enough to the State's attorney:

> Q. [By the State]: Mr. Worthy, let me see if I understand this. Are you saying that someone asked you to specifically place Offie Evans in a specific location in the Fulton County Jail so he could overhear conversations with Warren McCleskey?
>
> A. Yes, ma'am.

(R5-153). The "someone" Worthy was referring to, he clarified, was Detective Sidney Dorsey or some other "officer on the case." Jailor Worthy remembered that Dorsey and another officer had met privately with Offie

Evans in Worthy's own office at the Fulton County Jail. (R5-147-149; 150-153). Mr. Worthy offered one additional clarification:

> Judge, may I clarify that? . . . in this particular case this particular person [Evans] was already incarcerated. They just asked that he be moved near where the other gentleman [McCleskey] was.

(R5-155).

Worthy's testimony thus corroborated Offie Evans' state habeas testimony on two points – that a private meeting had occurred at the Fulton County Jail, and that both Detective Dorsey and informant Evans had attended it. Moreover, the previously undisclosed fact that Offie Evans had been moved from elsewhere in the Fulton County Jail to the cell next to petitioner McCleskey cleared up a central puzzle about Evans' 21-page statement.[4]

The State focuses its attack not on the straightforward account Worthy gave on July 9th, but on his second appearance – as a State's witness – during a rebuttal hearing held the following month. Worthy came before the District Court on July 9th without any time for

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[4] Although Evans was arrested and taken to the Fulton County Jail on July 3, 1978 (R5-101-17), his written statement is absolutely silent concerning any contact with McCleskey during the four-day period between July 3rd and July 8th. Only beginning on the 8th of July did Evans' statement begin to report any conversations with McCleskey and his partner Bernard Depree. (Pet. 8, at 1). Not until July 9th did Evans report that he first introduced himself to McCleskey, claiming that he was Ben Wright's uncle "Charles." (Pet. 8, at 3).

Why did Evans – whose statement reveals him to be a voluble and aggressive questioner – sit silently next to McCleskey for nearly a week? Worthy's testimony provided the answer: Evans had not been present in an adjacent cell until after his move, which came only several days after he was initially incarcerated. His non-stop questioning began soon after the move had been made.

rehearsal or any reason to shade his recollections; he had spoken with counsel for the State and for petitioner only momentarily before he took the stand. (R6-50-52; R6-118-119). Worthy later acknowledged that on July 9th, he knew nothing about the legal issues or the testimony of previous witnesses. (R6-52-53).

In the month between his initial hearing and the rebuttal hearing, however, Worthy – an eighteen-year veteran of the Sheriff's Department (R6-13) – met at least twice with State's attorneys. (R6-53-54). He also studied a newspaper account of the first hearing. (R6-55-56). When he reappeared under State auspices at the rebuttal hearing, Worthy initially tried, on direct examination, to retract important portions of his original account in a manner favorable to the State. When cross-examination began, however, he reluctantly reconfirmed, one-by-one, the major features of his earlier testimony. (*See* R-6-25-50). The District Court itself took over the questioning on the crucial issues:

> THE COURT: But you're satisfied that those three things happened, that they asked to have him put next to McCleskey, that they asked him to overhear McCleskey, and that they asked him to question McCleskey.
>
> THE WITNESS: I was asked can – to be placed near McCleskey's cell, I was asked.
>
> THE COURT: And you're satisfied that Evans was asked to overhear McCleskey talk about this case?
>
> THE WITNESS: Yes, sir.
>
> THE COURT: And that he was asked to kind of try to draw him out a little bit about it?
>
> THE WITNESS: Get some information from him.

(R6-64-65; *accord*, R6-26-28).

Although the State argued to the District Court – and now to this Court – that Worthy was "confused," petitioner urged another view: that the District Court should credit Worthy's uncoached account of July 9th, and

should view Worthy's hedging during the rebuttal hearing as the reluctance of a long-time law enforcement official, now well informed about the State's case, to give testimony damning the conduct of fellow police officers. In its subsequent opinion, the District Court demonstrated that it had thoroughly weighed these alternative interpretations (J.A. 80-81) and "[a]fter carefully considering the substance of Worthy's testimony, his demeanor, and the other relevant evidence," resolved the facts in petitioner's favor.

This is precisely the sort of factual finding that Rule 52 commits to district courts. *Anderson v. City of Bessemer City*, 470 U.S. 574, 757 (1985); *Amadeo v. Zant*, 486 U.S. 214 (1988); 486 U.S. 214, 225-226 (1988). The State's present attempt is nothing more than a reargument of factual points which have found acceptance neither in the District Court nor in the Court of Appeals. These arguments should be rejected.[5]

II

AMADEO V. ZANT CONTROLS THE ABUSE ISSUE ON PETITIONER'S APPEAL. NONE OF THE DISTRICT COURT'S FACTUAL FINDINGS ON ABUSE WERE "CLEARLY ERRONEOUS"

The District Court also made careful factual findings on the issue of abuse of the writ. The State avoids their

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[5] Needless to underscore, the State's resort to a subsequent adjudication of similar factual issues in another defendant's case – not a part of this record – is legally irrelevant and improper. *Ciucci v. Illinois*, 356 U.S. 571, 573 (1958) (per curiam) ("material, not being part of the record, and not having been considered by the [lower] courts, may not be considered here"); *cf. United States v. Johnson*, 713 F.2d 633, 648 (11th Cir. 1983); *see generally*, Rule 10(e), Fed. R. App. P.

The State had three prior opportunities to counter petitioner's evidence in this case – (i) during the original federal hearing in July of 1987, (ii) during the rebuttal hearing in August of 1987, and (iii) during its Rule 60(b) proceedings in 1988. It succeeded on none of them. Given three strikes, the State's factual argument is surely out.

force by characterizing them as "mixed questions of fact and law" which should receive *de novo* review (St.Br. 27) and, alternatively, by urging that they are clearly erroneous. (St.Br. 17). Neither course is acceptable.

Let us examine the questions the State would designate "mixed questions of fact and law." The District Court found for example (i) that there was "no showing of any reason that petitioner or his counsel should have known to interview Worthy specifically with regard to the *Massiah* claim" (J.A. 85), and (ii) that conducting interviews with three Atlanta police officers and jailors who later testified at the federal hearing "would [not] have allowed petitioner to assert this claim any earlier." (J.A. 85). The Court of Appeals disagreed with these findings; it asserted that petitioner had not "shown that a more extensive effort at that time . . . would not have turned up Worthy," (J.A. 128), and faulted counsel for not interviewing the officers.

As *Amadeo v. Zant* teaches, however, the District Court's findings on these points constituted primary, historical facts; the Court of Appeals was not free to disregard them. The progression of this case from district court to court of appeals parallels that in *Amadeo v. Zant*. Long after his trial, Amadeo uncovered an incriminating memorandum which indicated that the State had deliberately skewed jury lists to underrepresent blacks and women on his jury. 486 U.S. at 217-218. The State countered that Amadeo's lawyers should have found the memo earlier, and that Amadeo should therefore be barred from asserting the claim in habeas proceedings, absent proof of "cause" and "prejudice" under *Wainwright v. Sykes*.

The district court in *Amadeo* held an evidentiary hearing on the competing contentions; the principal questions, this Court later noted, were whether or not the State's jury misconduct

> was . . . reasonably discoverable because it was concealed by [State] officials, and if that concealment, rather than tactical considerations,

> was the reason for the failure of petitioner's lawyers to raise the jury challenge in the trial court.

486 U.S. at 222. Afterwards, the *Amadeo* court found as fact: (i) that the incriminating memorandum "was not reasonably available to petitioner's lawyers," 486 U.S. at 223; and (ii) that "petitioner's [trial] lawyers did not deliberately bypass the jury challenge." 486 U.S. at 224. When the Court of Appeals "expressed disagreement and substituted its own factual findings," (*id.*), this Court unanimously reversed, citing Rule 52 and the consistent line of cases enforcing that Rule. *E.g., Anderson v. City of Bessemer City*, 470 U.S. 564 (1985).

There is no meaningful distinction between the finding in *Amadeo* that the State's jury memo was not "readily discoverable" by Amadeo's counsel, and the finding here that Evans' 21-page statement and Ulysses Worthy would not have been discovered through further defense investigation. (J.A. 84). Nor is there a distinction between the district court findings in both *Amadeo* and *McCleskey* that "petitioner's lawyers did not deliberately bypass" their respective claims.[6] The designation of these issues as questions of fact for the district courts is thus directly controlled by *Amadeo*; it is also consistent with the Court's treatment of other, similar issues. *Cf. Maggio v. Fulford*, 462 U.S. 111 (1983) (per curiam) (petitioner's competence to stand trial requires deference under 28 U.S.C. §2254(d)).

The State alternatively argues that the court's finding that Evans' 21-page statement was not readily available

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[6] The most striking distinction between the two cases is that petitioner McCleskey's counsel was far more active in seeking the written documents and other evidence that ultimately made its claim. The trial lawyers in *Amadeo* apparently looked only cursorily, if at all, for evidence of jury underrepresentation. The District Court nonetheless held that, since the evidence of State misconduct would not have been found in any event, they had shown "cause" for any procedural default.

should be overturned as "clearly erroneous," since "the record establishes counsel should have been aware of it and . . . the state did not 'conceal' its existence." (St.Br. 6). This argument rests on the dubious proposition that defense counsel should somehow have realized from the way in which the State said "No," that the State actually meant "Yes" – that it had more evidence all the time. This cannot be the law; due process demands more of the State than a clever round of Twenty Questions. Defense counsel sought all written statements – not once, not twice, but *four times*, orally and in writing. Never did State officials turn over Evans' statement. It is doubletalk for the State to claim that it made Evans' statement "available" even as it repeatedly declined to turn over the document.

After a search for other "inexcusable" failures of petitioner, the State musters nothing but a slender roster of omissions, chiefly counsel's failure to interview Detectives Harris, Dorsey and jailor Hamilton. (St.Br. 33). Yet Hamilton later acknowledged that he didn't know where Evans had been housed before he was moved next to petitioner McCleskey; Detective Harris denied knowing or ever meeting with Evans except at the joint meeting with District Attorney Parker; and Detective Dorsey professed not to remember anything at all. It is no wonder, then, that the District Court – which listened to every one of these witnesses – later found that "it is difficult to see how conducting such interviews would have allowed petitioner to assert this claim any earlier." (J.A. 85).[7]

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[7] The allegation that attorney Stroup "did not attempt . . . to talk to the pertinent people" (St.Br. 33) is baseless. We refer the Court to pages 8-12 of our opening brief for a description of Stroup's efforts to locate "pertinent people." Equally unfounded is the suggestion that petitioner could have "discovered [Ulysses Worthy] . . . by a simple question directed to Detective Harris." (St.Br. 35). The question that ultimately led to Ulysses Worthy sought to determine from Detective Harris

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Nothing the State can point to, in sum, demonstrates that the District Court's findings on the issue of abuse are "clearly erroneous."[8]

III

FOR "DELIBERATE BYPASS" PURPOSES, WHAT COUNTS IS NOT SOLELY COUNSEL'S AWARENESS OF THE *LEGAL* BASIS FOR A CLAIM, BUT COUNSEL'S AWARENESS OF FACTS THAT WOULD SUPPORT THE CLAIM

As an alternative to its factual reargument, the State also offers a new reading of *Sanders v. United States*: knowledge of the legal basis for a claim should be deemed legally equivalent to knowledge of facts that would support the claim.

(Continued from previous page)

where the 21-page statement by Offie Evans had been taken. (R4-195). Not until petitioner finally received a copy of that statement in 1987, only weeks before he filed his second habeas petition, did there exist a predicate for this "simple question."

[8] While it is not worthy of separate coverage, we note that the state dismisses the District Court's factual findings which undergird its harmless error analysis on the ground that "the district court was doing nothing more than examining the state trial transcript." (St.Br. 17) "[T]here was no reason why the Eleventh Circuit Court of Appeals could not rely on . . . what it observed from the trial transcript . . . Any reviewing court can make similar citations to the existing record." (St.Br. 38).

This argument betrays unfamiliarity with the Rule 52 cases decided by this Court. While appellate courts doubtless "can" carry out their own fact-finding with the benefit of an existing record, the Court has held that it is reversible error for them to do so. *See, e.g., Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985). Yet here, that is exactly what happened. The Court of Appeals disregarded the District Court's primary findings of fact on the harmless error issue, adopted its own factual findings, and then declared that the *Massiah* error was harmless.

> "[T]here is no doubt that the Petitioner was aware of the [Massiah] claim as he raised it in his first state habeas corpus proceeding and counsel made a specific decision not to present the claim in the first federal petition . . . [T]his is precisely the type of conduct that the abuse of the writ doctrine is designed to prevent."

(St.Br. 23). Lest there be any doubt, the State repeats the point: "[T]he focus necessarily must be on the Petitioner's conduct, not his subjective believe as to the merits of the claim." (St.Br. 24).

Note carefully what the State proposes. This is not the conventional distinction between a "subjective" standard and an objective standard. An ordinary objective standard would charge a petitioner with knowledge of those facts and legal principles that a reasonable counsel should have uncovered. The State cannot acquiesce in such a standard here, of course, since the District Court expressly found that the facts demonstrating a *Massiah* claim are *not* reasonably discoverable by petitioner's counsel. Instead, the State turns to a new formulation; if a legal theory is known to counsel, he or she should be charged with carrying a claim forward *irrespective of whether any evidence can be found to support it*. Unsuccessful actions to substantiate the claim will not excuse an applicant; counsel must stubbornly cling to all conceivable claims, at every stage of post-conviction proceedings, irrespective of what the evidence shows, or risk the irremediable loss of those claims if some new evidence later comes to light.

Make no mistake; this is a strict liability standard; it has no warrant in this Court's precedents. It is foreign to the rationale of *Salinger v. Loisel*, 265 U.S. 224 (1924), *Wong Doo v. United States*, 265 U.S. 239 (1924), and *Price v. Johnston*, 334 U.S. 266 (1948). In those cases, the Court expressed keen interest in whether the applicants who

withheld their claims had access to the relevant facts.[9] Not only would the State's reformulation of *Sanders* depart sharply from precedent; we suggest to the Court that it would add measurably to the burden of present habeas corpus proceedings, by providing a major incentive for prudent habeas counsel to file – and pursue through discovery – enormous, outsized, factually dubious habeas pleadings. We doubt that either the interests of justice, or the interests of judicial administration, would be served by this result.

IV

THE CALL TO FASHION A NEW JUDICIAL STANDARD FOR JUDGING SUCCESSIVE HABEAS CLAIMS SHOULD BE REJECTED

Both the State and the Foundation – though primarily the latter – urge the Court to use Warren McCleskey's case as a vehicle to announce a new standard for successive petition cases. The State justifies its call with the assertion that "habeas corpus and the particular concept of abuse of the writ have been fluid concepts." (St.Br. 20).

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[9] For example, Price's attorney surely must have known that a prosecutor could not lawfully suborn perjury. Counsel also knew that after Price's prosecutor had conferenced with a key witness during a mid-trial break, the witness changed his testimony materially. The Court nevertheless allowed Price to proceed with a fourth federal habeas petition, alleging prosecutorial misconduct, because the Court could not assume, without further hearings, "that petitioner has acquired *no new or additional information* . . . that might indicate fraudulent conduct," 334 U.S. at 290 (emphasis added). The Court added that *"even if it is found that petitioner did have prior knowledge of all the facts*, . . . [he] may be able to present adequate reasons for not making the allegations earlier . . . which [would] make if fair and just for the trial court to overlook the delay." (*Id.*) (emphasis added). The rule in *Price* is a far cry from what the State has in mind.

The Foundation is more careful about its historical generalizations and more reckless in its future prescriptions. The Foundation has conducted sufficient historical review to recognize the longstanding legal commitment to preserve the resort to successor petitions – a commitment better described as "solid" than as "fluid."

Realizing that precedent is against its position, the Foundation has chosen to urge that the past be cast aside – lock, stock and barrel. Its method is veiled, but the underlying aim is clear. The Foundation dismisses the uniform teaching of the common law by stressing that "[t]he common law writ was totally unavailable for the relief which petitioner seeks in this case." (Fnd.Br. 3). Yet the major expansion of *substantive rights* of criminal defendants during the past two centuries does nothing to diminish the petitioner's *procedural* point: that an unbroken legal tradition has honored successive habeas petitions, allowing good faith applicants to raise, through habeas procedures, whatever legal rights the society has determined should be available to them.

The Foundation's review of federal precedent suffers from the same flaws, finding distinctions and distractions to obscure the central point. For example, it recasts *Ex parte Cuddy*, 40 F. 62 (1889), an early case that strongly supports petitioner's position (see Petitioner's Opening Brief at pages 29-30, note 26), to hold that "the denial of a prior writ is generally a sufficient reason to deny a second or subsequent writ, absent facts which did not *exist* at the time of the first petition." (Fnd.Br. 26). That is simply not what *Cuddy* held; it's not even a fair inference.

The crucial facts that Cuddy proffered in his second habeas petition were well-known to him at the time of his first application. As Justice Field stressed in denying the second application, not only did Cuddy fail to introduce those well-known facts at his initial hearing, he made no attempt to add them to the record by way of a supplemental application, or alternatively to suggest during his appeal that there were extra-record facts that might bolster his position. 40 F. at 66.

Read correctly, *Cuddy* presages later cases like *Wong Doo v. United States*, 265 U.S. 239, 241 (1924), where this Court branded a second application as an abuse because the record showed that the applicant "had full opportunity" to offer facts that were "accessible all the time" during his initial application. Petitioner's case plainly draws support from these cases, for it is undisputed that he did not have access to the crucial facts when he brought his initial federal petition; indeed, State officials were actively hiding the facts from him.

The Foundation's dismissive air extends not only to prior judicial precedent but to its analysis of the strong evidence that Congress opposes judicial encroachments on the law governing successive petitions. Perhaps its legislative analysis is best excused by its apparent conviction that any resort to legislative history is "dangerous" if not improper. (Fnd.Br. 22). Whatever, the explanation, the Foundation's analysis is faulty and misleading. For example, after arguing forcefully that the enactment of 28 U.S.C. §2244(b) in 1966 was meant to "make a substantial change in the law," (Fnd.Br. 22), the Foundation's factual support for its contention proves an anticlimax, little more than an expression of regret that "the [legislative] reports shed very little light on the precise contours of the intended change." (Fnd.Br. 23). The legislative reports in fact expressly identify the behavior that Congress was taking aim to proscribe – claims in successive petitions "predicated on grounds obviously well known to them when they filed the preceding application." S. Rep. No. 1797, 89th Cong., 2d Sess. 2 (1966). Yet since this target wouldn't fit the Foundation's purpose, the reference is dismissed as merely one example on a longer (but unspecified) congressional list.

The Foundation's exegesis of the legislative history of Rule 9(b) is similarly incomplete. It proceeds by sketching various polar positions urged on Congress by different groups, and then argues that since none of these positions

was finally accepted, Congressional intent must lie somewhere in the middle. (Fnd.Br. 23-25). Relegated to a passing reference is the language of the House Judiciary Committee's own final report, which stressed that the Committee sought to avoid "a new and undefined standard that [would give] a judge too broad a discretion to dismiss a second or successive petition." H.R. Rep. No. 94-1471, 94th Cong., 2d Sess. (1976). (The report also expressed congressional desire to "bring rule 9(b) into conformity with existing law," citing *Sanders* and 28 U.S.C. § 2244(b).)

V

PETITIONER McCLESKEY IS ENTITLED TO RELIEF ON THE MERITS EVEN UNDER A "CAUSE" AND "PREJUDICE" STANDARD

Having cut its great road through the law, the Foundation urges the Court to adopt a new "cause" and "prejudice" test for abuse, drawn from *Wainwright v. Sykes* and its progeny. The wisdom of this proposal aside, its timing is wrong. The Court should not announce a major change in the law that would have no effect upon the outcome of the case before it. Yet Warren McCleskey's *Massiah* claim would meet a "cause" and "prejudice" test. The Foundation itself appears uneasy on this point, conceding that, in principle, proof that the State concealed evidence would establish "cause" under *Amadeo v. Zant*. (Fnd.Br. 28). Yet with no more than passing knowledge of petitioner's record, the Foundation boldly asserts that "[p]etitioners showing falls far short of the kind of cover-up which constituted cause for default in *Amadeo*." (Fnd.Br. 29).

The Foundation plainly does not know this record well enough to make a credible argument.[10] Even were it

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[10] The Foundation has attempted a lesson in lawyering-by-hindsight to make its point: "Where the testimony of a jailhouse informant is central to the case, a claim under *United*

(Continued on following page)

better informed, however, it would still face an insuperable barrier in Rule 52. The District Court here made extensive factual findings on the underlying State misconduct, the availability of the hidden evidence, and the steps taken by habeas counsel to obtain that evidence. *Amadeo* holds unmistakably that these factual findings are not open to later revision or dismissal, neither by disgruntled parties nor by the appellate courts, nor by *amici*. Absent proof that the findings are "clearly erroneous," they must be honored on appeal. Thus, even under the Foundation's proposed test, petitioner McCleskey would be entitled to full habeas corpus relief.

CONCLUSION

This reply brief has addressed several points in the State's presentation. Left till last is one central point:

(Continued from previous page)

States v. Henry . . . is the obvious first place to look. The officer in charge of cell assignments would be the first person to ask. That person, apparently, was Officer Worthy, the officer now claimed to be a newly discovered witness." (Fnd.Br. 27).

Petitioner doesn't disagree with the fundamentals of this lesson. Its application to this case, however, overlooks (i) that petitioner's habeas counsel here *did* immediately see the possibility of a *Henry/Massiah* claim; (ii) that they asserted such a claim, then investigated that claim; (iii) that they also asserted a related claim, under *Giglio v. United States*, 405 U.S. 150 (1972), and eventually uncovered evidence sufficient to obtain relief from the federal district court (although relief was later overturned on appeal); (iv) that they too, thought of locating the officer in charge of cell assignments; and (v) that *they did so*, even though that officer – Bobby Edwards, *not* Ulysses Worthy, as the Foundation incorrectly assumed – had retired from the Fulton County Jail and was located, only with difficulty, in a community over 90 miles from Atlanta. (See Petitioner's Opening Brief at pages 9-10; R4-47-49). In short, measured by the Foundation's standards, petitioner's performance, as the District Court found, was reasonable and adequate.

Certain State officials have been caught hiding the very evidence that other State officials now contend should have been uncovered by petitioner sooner. Petitioner's claim should be barred, the State says, even though State actors "stepped out of line . . . [and] ignored the rule of law." (J.A. 90).

Petitioner's case is strong on all issues; but on this point, as *Amadeo* teaches, his legal position is unassailable. The State cannot "sandbag," withholding crucial evidence when asked for it, and then profit by its own misconduct. Nor can it be allowed to defend its misconduct with the excuse that the left hand didn't know the mischief the right hand was up to. When a State prosecutor testifies, under oath, that his prosecution of a capital case was not tainted by unlawful informant testimony, lawyers and citizens alike are entitled to rely on his word. It is not an abuse of the Great Writ for habeas applicants and their counsel to repose confidence in the integrity of State authorities.

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

JULIUS L. CHAMBERS, III
RICHARD H. BURR, III
GEORGE H. KENDALL
99 Hudson Street
New York, New York
10013
(212) 219-1900

ANTHONY G. AMSTERDAM
New York University
School of Law
40 Washington
Square South
New York, New York
10012
(212) 998-6198

* Attorney of Record

ROBERT H. STROUP
141 Walton Street
Atlanta, Georgia 30303
(404) 522-8500

* JOHN CHARLES BOGER
School of Law, CB# 3380
Van Hecke-Wettach Hall
Chapel Hill, North Carolina
27599
(919) 962-8516

Attorneys for
Petitioner
Warren McCleskey